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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ELLEN HESS,

Plaintiff and Respondent,

v.

ALFRED BEARMAN,

Defendant and Appellant.

B206007

(Los Angeles County
Super. Ct. No. BP105687)

APPEAL from an order of the Superior Court of Los Angeles County, Reva G. Goetz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Hinojosa & Wallet, Lynard C. Honojosa and Katerina F. Smith for Defendant and Appellant.

Freeman, Freeman & Smiley, Stephen M. Lowe and Jared A. Barry for Plaintiff and Respondent.

INTRODUCTION

Appellant Alfred Bearman (Bearman) appeals from an order granting the “safe-harbor” petition of respondent Ellen Hess (Ellen) under Probate Code section 21320.¹ By her petition, Ellen sought a declaration that her proposed petition to determine the validity of a testamentary power of appointment and for an accounting did not violate the no contest clauses in The Frederic L. Hess, Jr. and Rita R. Hess Living Trust or the will of Frederic L. Hess, Jr. We affirm.

FACTS

On October 13, 1989, Frederic and Rita Hess (Frederic and Rita, collectively Settlers), created The Frederic L. Hess, Jr. and Rita R. Hess Living Trust (Trust). The Trust was completely restated on May 5, 2001. Frederic and Rita were initially the co-trustees of the Trust. If either Frederic or Rita ceased to act as a trustee, the other was to serve as the sole trustee. If both ceased to serve, then Ellen and her sister, Emily, were to serve as co-trustees, or if one of them ceased to serve, the other would serve as sole trustee.

On September 13, 2001, Rita died. Pursuant to Trust provisions, the trust estate was divided into three separate trusts: the Survivor’s Trust, Marital Trust and Credit Trust. Frederic appointed Bearman to be his co-trustee. On June 20, 2003, Frederic executed the First Amendment to the Trust, as settlor, and also exercised his rights to exercise a power of appointment over the Survivor’s Trust, Marital Trust and Credit Trust. Frederic died on March 15, 2007.

Ellen filed a safe harbor petition concerning a portion of the power of appointment. The contested portion of the power of appointment provided as follows:

¹ All statutory references are to the Probate Code.

- “a. Reappoint [Bearman] as the sole successor trustee of the Trust and subtrusts . . . ;
- “b. Appoint a successor trustee if [Bearman] fails to act;
- “c. Provide that [Ellen’s] and her sister’s trusts not terminate and be retained in with discretionary distributions;
- “d. Upon [Ellen’s] death, trusts be established and held for the benefit of the grandchildren with discretionary distribution;
- “e. Provide the suspension of distributions to any beneficiary who is abusing drugs or alcohol; and
- “f. Provide for the support of Fred’s sister-in-law (in the event of the prior death of Fred’s brother).”

Ellen sought to challenge the validity of the purported testamentary power of appointment on grounds that:

- “a. It [was] the product of undue influence exerted on Frederic by [Bearman];
- “b. Frederic lacked testamentary capacity at the time it was executed; and,
- “c. It fail[ed] for lack of due execution in accordance with the terms of the Trust.”

Ellen’s safe harbor petition requested the court to declare whether or not filing the proposed petition would violate the Trust’s no contest clause. Bearman filed a response and objections and Ellen filed a reply. After a hearing, the probate court issued its ruling providing that the proposed petition would not violate the Trust’s no contest clause.

DISCUSSION

The Court of Appeal reviews de novo the trial court’s decision whether there has been a contest within the meaning of a no contest clause in a will or trust. (*Estate of Davies* (2005) 127 Cal.App.4th 1164, 1173.) Resolution of conflicting policies underlying enforcement of no contest clauses requires that such clauses be strictly construed and not extended beyond what was plainly the testator’s or settlor’s intent. (*Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1207.)

Section 21305, subdivision (a)(3), provides in pertinent part that, “[f]or instruments executed on or after January 1, 2001 . . . [a] challenge to the validity of an instrument . . . other than the instrument containing the no contest clause” is not a contest, unless the no contest clause expressly identifies the challenged instrument. The purported power of appointment was purportedly executed by Frederic in 2005. It does not contain a no contest clause or contain any language specifically incorporating the no contest clauses from the Trust.

The no contest clause of the Trust does not identify a challenge to an exercise of a power of appointment as a violation of the no contest clause. It provides: “If any person, singly or in conjunction with any other person or persons, directly or indirectly contests or attacks this document or the Will of either Settlor or the validity of any trust under this document or any beneficiary designation for insurance, employee benefits, deferred compensation and other assets passing outside this document or a Settlor’s Will or seeks to obtain an adjudication in any proceeding in any court that this document or such Will or any of the provisions thereof or any such beneficiary designation is void or otherwise seeks to void, nullify or set aside this document or a Settlor’s Will or any of the provisions thereof or any such beneficiary designation, or conspires with or voluntarily assists anyone attempting to do any of these things, then all gifts to and interests of that person under this document shall be forfeited and shall be allocated to or in trust for such Beneficiaries who have not participated in such acts or proceedings in the same manner as if that person had predeceased the Settlers without leaving surviving issue. The Trustee is hereby authorized to defend, at the expense of the trust estate, any matter described in this Paragraph 8.5 and any other action or matter that would interfere with the disposition of assets of the trust estate pursuant to the Settlers’ estate plan as provided in this document, the Settlers’ Wills, said beneficiary designations, amendments to said documents and any other documents that are testamentary in nature.”

The seminal case in this area is *Estate of Rossi* (2006) 138 Cal.App.4th 1325. In *Rossi*, the decedent executed a pour-over will and revocable trust on November 21, 2003, that made specific gifts to his wife and left the balance to his children by a previous

marriage. The trust and will each contained a no contest clause and both clauses referred to the will and the trust. The decedent executed an amendment to the trust before his death in November 2004 that did not include a no contest clause. The trial court granted a beneficiary's application pursuant to section 21320 and determined that the probate petitions challenging the amendment that the beneficiary planned to file would not violate the no contest clauses in decedent's will and trust. (*Rossi, supra*, at pp. 1328-1330.) The Court of Appeal affirmed, stating that since the instruments were executed after January 1, 2001, they were subject to the specificity requirements of section 21305, subdivision (a). (*Rossi, supra*, at pp. 1337-1338.) The amendment was a separate instrument, and because it did not contain a no contest clause, it could be challenged without violating the no contest clauses in the will and trust. (*Id.* at p. 1340.)

In the instant case, the purported power of appointment was purportedly executed sometime in 2005. The no contest clause in the Trust, like that in *Rossi*, did not identify a challenge to an exercise of a power of appointment as a violation of the no contest clause. The purported power of appointment did not contain a no contest clause and did not contain language specifically incorporating the no contest clause from the Trust. The trial court properly found that pursuant to section 21305, subdivision (a)(3), the purported power of appointment was subject to challenge by the proposed petition without triggering the no contest clause of the Trust. (*Estate of Rossi, supra*, 138 Cal.App.4th at p. 1340.)

Bearman argues that "an attack on the exercise of the power of appointment [is] an attack on the Trust itself." A similar argument to that made by Bearman, that the purported power of appointment is not a separate stand-alone document, was rejected in the *Rossi* case. In *Rossi*, the trust authorized the trustor to amend his trust, but the second amendment by the trustor was not subject to the original trust's no contest clause because it was a separate instrument that did not contain a no contest clause. The appellant argued that the original trust and the second amendment formed an "integrated" document. The court rejected that argument, noting that it would render superfluous the

provisions of section 21305 as to the dates of the documents to which it applies. (*Estate of Rossi, supra*, 138 Cal.App.4th at p. 1337.)

Bearman's additional argument that the no contest clause sufficiently identifies the exercise of a power of appointment is unpersuasive. Bearman admits that the no contest clause is "not a model of clarity." The law requires, however, that the testator's intent be clear and unequivocal in the no contest clause. (*Estate of Black* (1984) 160 Cal.App.3d 582, 587.) Bearman's candid admission makes it clear that it would be a stretch to accept his argument and interpret the no contest clause beyond its plain meaning.

Bearman also claims that the purported power of appointment falls within the terms of the no contest clause, which provides that a contest includes a challenge to the trust or any provision thereof. His logic is faulty. Ellen is not challenging Frederic's right to exercise a power of appointment under the Trust. Rather, she is challenging a separate instrument by which Frederic exercised his powers granted under the Trust.

We also are not persuaded that the purported power of appointment is a "beneficiary designation" within the meaning of the Trust. The Trust's no contest clause in Paragraph 8.5 relating to a beneficiary designation specifies that the no contest penalty applies to anyone who "directly or indirectly contests or attacks this document or the Will of either Settlor or the validity of any trust under this document or any beneficiary designation for insurance, employee benefits, deferred compensation and other assets passing outside this document or a Settlor's Will" Strictly construing the language, we do not find that the purported power of attorney is a beneficiary designation as contemplated by the Settlers.

The provisions of Paragraph 8.5 of the Trust specify which instruments, if challenged, would trigger the forfeiture provisions of the no contest clause. The documents identified in the no contest clause are the Trust, the Will of either Settlor, any trust created under the Trust, or a "beneficiary designation for insurance, employee benefits, deferred compensation and other assets passing outside this document." Conspicuously absent from the instruments specified is the exercise of the Settlers' power of appointment. A logical interpretation of the no contest clause is that the power

of appointment was intentionally omitted from the scope of the no contest clause. (Cf. *People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1578-1579; see *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 494-495.)

Bearman's attempts to expand the language of the no contest provision in Paragraph 8.5 to encompass the power of appointment fail. Bearman contends that the no contest clause specifically authorizes the Trustee to "defend, at the expense of the trust estate, any matter described in this Paragraph 8.5 and any other action or matter that would interfere with the disposition of assets of the trust estate pursuant to the Settlers' estate plan as provided in this document, the Settlers' Wills, said beneficiaries designations, amendments to said documents and any other documents that are testamentary in nature." A reasonable interpretation of this paragraph is that the first portion of the paragraph, "any matter described in this Paragraph 8.5," sets out the actions that would constitute a contest of the Trust. The language in the last portion, "any other action or matter," applies to other actions that are not identified as contests.

Bearman's reliance on *Schwartz v. Schwartz* (2008) 167 Cal.App.4th 733 is misplaced. In *Schwartz*, the settlor's trust contained a no contest clause applicable to the trust and a will. The court held that an attack on a codicil to the settlor's will constituted a contest within the meaning of the no contest clause. (*Id.* at pp. 743-745.) *Schwartz* did not address the effect of section 21305, subdivision (a)(3), on an instrument executed after January 1, 2001, which is at issue here. It is well established that cases are not authority for propositions not considered. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 4.)

DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.